

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
TRENTON DIVISION

<b>KELLI SMITH, individually and on</b>	)	Docket No. 3:13-cv-02970-MAS-LHG
<b><i>behalf of a class of similarly situated</i></b>	)	
<b><i>female employees, RACHEL MOUNTIS,</i></b>	)	
<b>AMY SHURSKY and KATE WHITMER,</b>	)	
	)	
<b>Plaintiffs,</b>	)	Courtroom No. 7E
	)	Clarkson S. Fisher Building
<b>versus</b>	)	& U.S. Courthouse
	)	402 East State Street
<b>MERCK &amp; CO., INC.,</b>	)	Trenton, New Jersey 08608
	)	
<b>Defendant.</b>	)	October 13, 2015
	)	3:22 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE RE: PLAINTIFFS'  
DISCOVERY REQUEST  
BEFORE HONORABLE LOIS H. GOODMAN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:	Sanford Heisler, LLP By: DEBORAH MARCUSE, ESQ. DAVID TRACEY, ESQ. 1350 Avenue of the Americas 31st Floor New York, New York 10019
For the Defendant:	Morgan Lewis & Bockius, LLP By: CHRISSY KATZENSTEIN, ESQ. CAILIN HEILIG, ESQ. 1701 Market Street Philadelphia, Pennsylvania 19103
ESR/Courtroom Deputy:	Ivannya Jimenez
<b>TRANSCRIPTION SERVICE:</b>	<b>TRANSCRIPTS PLUS, INC.</b> <b>435 Riverview Circle</b> <b>New Hope, Pennsylvania 18938</b> <b>Telephone: 215-862-1115</b> <b>Facsimile: 215-862-6639</b> <b>e-mail <u>CourtTranscripts@aol.com</u></b>

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1           TRENTON, NEW JERSEY   OCTOBER 13, 2015   3:22 P.M.

2           (Call to order of the Court)

3           THE COURT:   (Recording commences with the following)

4   ... put that on the record, and then we can address what else  
5 we need to do.

6           I have -- well, we have several letters where  
7 plaintiff is seeking additional discovery from defendant Merck.  
8 We discussed this at length during our conference on August 10,  
9 2015, which was also conducted on the record. And at that  
10 time, I had additional questions which we went into during the  
11 call, and I asked for further briefing. That was presented to  
12 the Court by letter dated August 13, 2015, on the docket as  
13 Docket Entry 73.

14           In reviewing the letter, it was clear to me that  
15 plaintiffs were not seeking the discovery we are talking about  
16 for purposes of the motion to certify the collective action,  
17 one of the original concerns that the Court had. And that  
18 motion has since been filed.

19           In fact, in the interim, plaintiffs have filed  
20 several motions:

21           There is a motion for leave to amend that was filed  
22 on September 11, 2015, that is Docket Entry 76;

23           There is a motion to certify the class -- actually to  
24 certify the collective action, that is Docket Entry 77;

25           And there is a motion to also certify the collective

1 action under the Equal Pay Act, along with a motion for  
2 equitable tolling, and that is Docket Entry -- well, we have  
3 Docket Entry 78 and 79.

4 Now with regard to the requests that plaintiff has  
5 made, I am going to go through them. But I am not planning to  
6 set out with detail what each party has argued, just set out  
7 sufficient description of each party's position so that you  
8 understand where I am coming from.

9 Plaintiff is seeking personnel and pay discovery back  
10 to the beginning of 2009 with regard to potential class members  
11 -- actually not with regard to class members, but outside of  
12 the class.

13 Merck has indicated that it has provided personnel  
14 and pay data starting December, 2010.

15 The difference here is with regard to data for people  
16 who would have otherwise been potential class members, and  
17 their comparators, but who left the company.

18 So just to clarify, Merck says it has produced all  
19 data for people who are potential class members, and their  
20 comparators, who have remained with the company. If they left  
21 prior to December, 2010, their information has not been  
22 produced.

23 The parties disagree as to the relevant period for  
24 discovery, both cite cases supporting their views. And the  
25 issues relate to both Title VII claims and Equal Pay Act

1 claims.

2           The arguments as to the appropriate time period for  
3 discovery are different for Title VII as opposed to the EPA  
4 claims.

5           With the Title VII claims, plaintiffs point to cases  
6 allowing discovery for a period prior to the proposed class  
7 period. Plaintiffs say it is essential for them to get that  
8 information in order to determine whether there is a pattern  
9 and practice of discrimination, or a facially neutral practice  
10 that has a disparate impact.

11           They express a concern that limiting discovery to the  
12 period selected by Merck runs the risk of skewing the data.  
13 They say that the case law supports discovery for a reasonable  
14 period prior to the damages/liability period.

15           Merck, on the other hand, says it has already  
16 provided the pre-liability discovery as to class members and  
17 their comparators from the date of hire, regardless of whether  
18 it was before or after December, 2010. This, according to  
19 Merck, constitutes four and a half years of data for  
20 approximately 5,800 individuals.

21           They say the distinction plaintiffs are making, and  
22 the discovery plaintiffs are seeking, is irrelevant as a  
23 result.

24           They also say that discovery should not include data  
25 for individuals whose claims are time-barred. Now that is all

1 with regard to the Title VII claims.

2 With regard to the EPA, or Equal Pay Act, claims,  
3 there are different arguments, mostly focused on how far back  
4 plaintiffs' claims go. This depends, in large part, on the  
5 tolling agreements in place between the parties and how those  
6 agreements should be interpreted.

7 Plaintiffs also ask the Court to take into  
8 consideration their motion for equitable tolling of the Statute  
9 of Limitations for the EPA claims.

10 Based on their tolling agreements, plaintiffs say the  
11 claims should be viewed as dating back to April, 2010, at the  
12 latest, and possibly sometime in 2009 if equitable tolling is  
13 granted.

14 Merck disagrees as to how the tolling agreement from  
15 2012 should be read, and asserts that the EPA claims should  
16 only go back to May, 2011, at most.

17 The equitable tolling motion has been filed, as I  
18 said earlier, and is now pending before Judge Shipp. I have no  
19 doubt that at some point, the interpretation of the 2012  
20 tolling agreement will be before Judge Shipp, as well. I do  
21 not intend to decide those motions as part of this discovery  
22 dispute, nor would it be appropriate to do so.

23 In terms of discovery, I do find that plaintiffs had  
24 made a cogent argument with regard to the tolling of the EPA  
25 claims, that discovery should go back to some point before

1 December, 2010.

2 And with regard to the Title VII claim, that  
3 discovery should go back a reasonable period before the  
4 liability/damages period.

5 Based on that, I am persuaded that a reasonable  
6 period before December, 2012 is appropriate.

7 The question then is what is reasonable? Because I  
8 am not deciding on this call, or at any point, the tolling  
9 issue; that is before Judge Shipp. I am not basing the time  
10 frame on the possibility that claims from 2009 would all be  
11 allowed in the case. Frankly, that is fairly speculative at  
12 this point.

13 Rather, I look instead to the burden on Merck in  
14 considering what would constitute a reasonable period.

15 Merck says that they would have to create two queries  
16 to find out and identify employees who are sales  
17 representatives from January 1, 2009 to November 30, 2010. The  
18 second query would extract the data for the individuals so  
19 identified.

20 This becomes more complicated, however, prior to mid-  
21 2009 when Merck changed its H.R. computer system. For that  
22 pre-mid-2009 period, Merck would have to access the legacy  
23 database and deal with it separately.

24 I find that it is not an undue burden for Merck to  
25 create the queries and extract the data for the period in which

1 the current H.R. system has been in place.

2 That means that I am instructing Merck to pull and  
3 produce data for employees who were sales representatives from  
4 mid-2009 when the current system was implement, to December,  
5 2010 when they started their actual production.

6 I find that this would provide a reasonable period  
7 prior to the class liability period for Title VII purposes, and  
8 would also provide the data, if plaintiffs are correct, as to  
9 the effect of the 2012 tolling agreement.

10 So that is what I want Merck to do. That is my  
11 finding. I would like to hear from counsel for Merck now as to  
12 how long it will take to accomplish this so that we can stay on  
13 schedule. Counsel?

14 MS. KATZENSTEIN: Thank you, Your Honor. I think  
15 that I will just have to go back and double-check with my  
16 client to confirm. I know the last time we had said, I believe  
17 it was two weeks, and had stipulated, if necessary, with  
18 plaintiffs' counsel to an initial day, I don't think that  
19 become necessary. But I know it was a pretty significant time  
20 crunch for our client. So I would expect that we would need --  
21 probably three weeks is more realistic for this pull, just  
22 given the last experience.

23 THE COURT: All right. And where does that leave us  
24 in terms of the larger schedule? We have motions pending. We  
25 have fact discovery ongoing, and a separate schedule for the

1 Rule 23 class cert motion.

2 Ms. Marcuse, any comment?

3 MS. MARCUSE: Your Honor, I mean I think that we  
4 should be able to stay on schedule.

5 I would just like to clarify, you know, my  
6 understanding is that the data pull here is going to be less  
7 significant than what took -- well, no, I guess it's going to  
8 be about the same amount of time.

9 I'm just, you know, a little bit concerned about the  
10 timing. If it could be done within two weeks, rather than  
11 three, that would certainly be our preference. But for the  
12 rest, we don't -- we absolutely don't want to hold up the  
13 schedule in any way.

14 MS. KATZENSTEIN: And I would just note I think we  
15 will still be, you know, just finishing up with conditional  
16 certification briefing, and plaintiff will be doing their  
17 reply.

18 So I wouldn't expect that -- in terms of where we are  
19 in discovery, and what we have planned going forward, that  
20 anything would be largely different, whether it would take us  
21 that additional week or not. I just know based on kind of  
22 allowing the client sufficient time to pull that information,  
23 getting their infrastructure in gear to do it, irrespective of  
24 the time frame, it's the same process in terms of pulling the  
25 data.



1           And so I think that three weeks would give us that  
2 extra cushion to make it less burdensome for the client.

3           THE COURT: All right. Well, frankly, whether it's  
4 two weeks or three weeks, I would like you to get it going  
5 promptly, and make every effort to get it done as expeditiously  
6 as possible.

7           MS. KATZENSTEIN: Yes, Your Honor.

8           THE COURT: I am not, at this point, changing  
9 anything else in the schedule.

10           I am going to ask Ms. Marcuse to prepare an order  
11 from today, provide it to defense counsel before you submit it.  
12 And then send it in with a notation that everybody has signed  
13 off on the language of it. All right?

14           MS. KATZENSTEIN: Yes, Your Honor.

15           MS. MARCUSE: Yes, Your Honor.

16           THE COURT: Now with regard to the motion to amend  
17 that is on the docket, is that opposed?

18           MS. KATZENSTEIN: Yes, Your Honor. Merck will be  
19 filing its opposition on Friday, October 16th.

20           THE COURT: And I hate to do this at this point, I  
21 usually remember to do it in the beginning, and ask you when  
22 you speak to state your name. Just in case someone gets a  
23 transcript, and we don't have the poor transcriber trying to  
24 figure out who is speaking.

25           Was that Ms. Katzenstein?

1 MS. KATZENSTEIN: Yes, Your Honor; I apologize.

2 THE COURT: Okay. All right. So when that is fully  
3 briefed, we will take a look at it.

4 What I would like to do is set you up for a call in a  
5 couple of months just as a status call to make sure that  
6 everything is moving along as it should be. Let me get the  
7 calendar.

8 (Pause)

9 THE COURT: I don't know if you all will be working  
10 the week between Christmas and New Year's, it is a dreadful  
11 time, but many of us will be working. Can we do a call on  
12 December 29? Otherwise it will be off until January.

13 MS. KATZENSTEIN: This is --

14 MS. MARCUSE: This is Deborah Marcuse -- I'm sorry.

15 MS. KATZENSTEIN: No go ahead.

16 MS. MARCUSE: That works for us.

17 MS. KATZENSTEIN: Yes, and this is Chrissy  
18 Katzenstein. That works for us, as well.

19 THE COURT: All right. So we are all working that  
20 week. So let's have a call December 29 at 10 a.m.

21 MS. MARCUSE: Thank you, Your Honor.

22 THE COURT: I will ask --

23 MS. MARCUSE: This is Deborah Marcuse.

24 THE COURT: Thank you. I will ask defendant to  
25 initiate the call. If you have any problems before then,

1 please let me know. But otherwise, I will expect discovery to  
2 be moving along, and these motions to be briefed, and we will  
3 see where we stand.

4 MS. KATZENSTEIN: Thank you, Your Honor.

5 THE COURT: All right. Anything else?

6 MS. MARCUSE: No, Your Honor. Not from plaintiffs,  
7 Your Honor.

8 MS. KATZENSTEIN: Not from defendant, Your Honor.

9 THE COURT: All right. Thank you, all, very much. I  
10 will talk to you in December.

11 MS. KATZENSTEIN: Thank you.

12 MS. MARCUSE: Thank you very much. Bye-bye.

13 THE COURT: Bye-bye.

14 (Whereupon, at 3:38 p.m., the hearing was adjourned.)  
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I, KAREN HARTMANN, a certified Electronic Court Transcriber, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A rectangular box containing a handwritten signature in cursive script that reads "Karen Hartmann".

Karen Hartmann, AAERT CET\*\*D0475 Date: October 16, 2015  
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